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# Official Report of Debates (Hansard)

Thursday 10 March 2011

# Journal des débats (Hansard)

Jeudi 10 mars 2011

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## LEGISLATIVE ASSEMBLY OF ONTARIO

## ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

**SELECT COMMITTEE ON  
THE PROPOSED TRANSACTION  
OF THE TMX GROUP AND THE  
LONDON STOCK EXCHANGE GROUP**

Thursday 10 March 2011

**COMITÉ SPÉCIAL SUR LA  
TRANSACTION PROPOSÉE  
ENTRE LE GROUPE TMX ET LE  
LONDON STOCK EXCHANGE GROUP**

Jeudi 10 mars 2011

*The committee met at 0900 in room 151.*

**REVIEW OF PROPOSED STOCK  
EXCHANGE TRANSACTION**

**ONTARIO SECURITIES COMMISSION**

**The Chair (Hon. Gerry Phillips):** Ladies and gentlemen, and Mr. Wetston, thank you and welcome to the committee. We've set aside an hour for presentation and then discussion. As I say, we appreciate you being here. Perhaps you could, for Hansard, introduce yourself and your colleagues, then give the presentation, and then we'll have a discussion. Thank you.

**Mr. Howard Wetston:** Thank you very much. Would you like me to begin, Mr. Chairman?

**The Chair (Hon. Gerry Phillips):** Yes, please.

**Mr. Howard Wetston:** Thank you so much. Good morning, Mr. Chairman, members of the select committee, and ladies and gentlemen. My name is Howard Wetston and I am the chair and CEO of the Ontario Securities Commission. To my right, I have Leslie Byberg, who is our director of corporate finance at the OSC, and to my immediate right is Susan Greenglass, who is our director of market regulation at the Ontario Securities Commission. I do have some other colleagues with me as well, in case I need a bit of assistance with some of your questions. I hope you won't mind if I call on them, if necessary.

Firstly, Mr. Chairman, I want to thank you so much for inviting me to appear before you today. I'm going to describe the OSC's regulatory responsibility as it relates to the proposed transaction between the TMX Group and the LSE Group.

I would also like to thank you so much for accommodating me this morning. I recognize that originally the invitation was for Wednesday and it was difficult for me to be here, so thank you so much for accommodating me for Thursday morning.

In my presentation today, I will address the following:

—the role of exchanges in our capital markets and how the market is evolving;

—the OSC's regulation and oversight of exchanges and why that has been, and will remain, critical in the public interest;

—the criteria that the OSC will apply in determining whether the proposed transaction is in the public interest; and

—the process that the OSC will follow to review and assess the proposed transaction.

Exchanges are key market infrastructure entities and play a critical role in the efficient operation of our capital markets. A 2006 report by the International Organization of Securities Commissions entitled *Regulatory Issues Arising from Exchange Evolution* described the public interest role of exchanges as follows:

"The fair and efficient functioning of an exchange is of significant benefit to the public. The efficiency of the secondary market in providing liquidity and accurate price discovery facilitates efficient raising of capital for commercial enterprises, benefiting both the wider corporate sector and the economy as a whole. The failure of an exchange to perform its regulatory functions properly will have a similarly wide impact."

Not only does an exchange provide a trading facility; it plays an important role in facilitating capital-raising, setting standards for the listing of securities and imposing ongoing requirements.

Also, an exchange may provide certain services beyond traditional trading services; for example, clearing and settlement, and data services.

Canadian capital markets have evolved rapidly over the past few years. We have moved from a centralized market to an environment of multiple marketplaces trading the same securities. Yesterday, IIROC presented to the committee—Susan Wolburgh Jenah was here, as you know. She presented to the committee and discussed the evolution in the Canadian markets.

This changing landscape is also occurring globally. Over the past 15 years, exchanges have responded by changing their operating models and the way they carry on business. They have demutualized—as you note, they have moved from a member-owned structure to a for-profit corporation—and, in most cases, become listed entities themselves. They have also consolidated through mergers and acquisitions as they have faced increasing competition from alternative venues.

These developments are complex, sometimes involving multiple regulators in multiple jurisdictions with different regulatory regimes. In response, securities regu-



lators are taking steps to ensure that their domestic regulatory oversight remains intact.

In Ontario, consistent with global developments, the Toronto Stock Exchange demutualized in 2000, became a listed company in 2002 and now faces competition from alternative trading systems, or ATSSs. There are currently eight equity marketplaces operating in Ontario: two recognized exchanges, the TSX and the CNSX, which also operates Pure Trading; and six ATSSs—Alpha, Chi-X, Omega, Bloomberg Tradebook, MATCH Now and Liquidnet.

Despite these changes, regulatory oversight continues to ensure that investors are afforded protection, issuers continue to have access to capital, the market remains transparent, fair and efficient, and confidence in our capital markets is maintained.

Securities regulators generally supervise exchanges to ensure that they fulfill their roles in a manner consistent with the public interest. The importance of regulatory oversight of exchanges is recognized internationally. IOSCO's principles of securities regulation state that there should be ongoing regulatory supervision of exchanges and trading systems to ensure that the integrity of trading is maintained through fair and equitable rules that strike an appropriate balance between the demands of different market participants. Regulatory oversight is critical to maintain confidence in the operations of the exchange and support overall market quality, including liquidity, transparency and transaction costs.

The Securities Act—we have a copy here—mandates the OSC to provide protection to investors and to foster fair and efficient capital markets and confidence in those markets. As part of that mandate, we are responsible for the oversight of marketplaces and both exchanges, as well as the alternative trading systems, or ATSSs, that operate in Ontario.

As you know, exchanges operate in several jurisdictions in Canada. To coordinate oversight and avoid duplication, pursuant to a memorandum of understanding among the relevant CSA jurisdictions, we have an effective lead regulator model for exchanges in Canada. This model specifies a jurisdiction that is responsible for the oversight of the exchange. Other jurisdictions in which the exchange carries on business may exempt that exchange and rely on the oversight of the lead regulator.

The OSC is the lead regulator of the TSX, but we also regulate the TMX Group; I want to highlight that point for you. The BC and Alberta securities commissions are joint regulators of the TSX Venture Exchange. The Alberta Securities Commission is the lead regulator of the Natural Gas Exchange and the Quebec securities regulator is the lead regulator of the Bourse de Montréal. The OSC is an exempting regulator for all of these other exchanges and relies on the other jurisdictions for their oversight of those exchanges.

Before exchanges can carry on business in Ontario, they are required to be recognized by the OSC. Recognition is similar to a licensing process, where the commission considers whether it is in the public interest that

an exchange be permitted to operate in Ontario and under what conditions; put another way, whether it can carry on business in Ontario.

In order to obtain recognition, an exchange must meet certain criteria that the commission considers in order to determine whether or not it will grant recognition.

An exchange is required to have a governance structure with a board of directors that provides for fair and meaningful representation, one of the components of which is appropriate representation of independent directors on that board.

An exchange is also required to provide for fair access to the services of the exchange. For example, the exchange cannot charge fees that unreasonably condition or limit access to any service provided by the exchange.

An exchange must have arrangements in place to appropriately regulate listed issuers seeking to raise capital. For example, issuers are required to make timely disclosure of certain information.

An exchange must also regulate the trading of its participants. This may be done directly or through IIROC. As you heard yesterday, the exchanges in Canada have all retained IIROC, by way of contract, to perform this function on their behalf.

Exchanges must have systems with appropriate capacity and integrity that are subject to regular testing and reviews, and exchanges must co-operate and share information with the OSC and other regulators.

These criteria form the basis for the commission to assess whether the exchange operates in a manner that is in the public interest. I would like to emphasize that, as part of the recognition process, we impose terms and conditions. These terms and conditions are critical. They impose ongoing requirements that mirror the criteria that I have mentioned and impose requirements specific to the structure and operations of the exchange.

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The terms and conditions are also key to ensuring that we continue to have the appropriate level of oversight over the ongoing operations and structure of the exchange. This framework is important so that market quality, which I mentioned earlier, and market integrity are maintained. For example, the terms and conditions may impose requirements on the board of an exchange or require prior approval should ownership, structure or other circumstances of the exchange's operations change.

Once an exchange is recognized, we continue to regulate and oversee its operations to ensure that the standards set at the time of recognition continue to be met. Our ongoing oversight program of an exchange is robust and has three main components: the review of information filed on significant changes, the review and approval of changes to all rules, and periodic oversight reviews.

With that background, I will move on to our oversight of the TSX and the TMX Group and our role in reviewing the proposed transaction. We regulate the TSX, the operating exchange, but we also regulate the parent company, the TMX Group, as an exchange. This is unique. The commission made the decision to regulate both the



TSX and the TMX Group as exchanges to ensure that all aspects are effectively regulated regardless of where the functions are performed.

The TSX and the TMX Group operate under a recognition order granted by the commission with terms and conditions. The terms and conditions applicable to the TMX Group require that, as the parent of the operating exchange, it will allocate sufficient financial and other resources to the TSX to ensure that the TSX can carry out its functions in a manner consistent with the public interest and the terms and conditions of its recognition. In addition, the TMX Group is required to do everything within its control to cause the TSX to carry out its activities as an exchange and to comply with its terms and conditions.

TMX and LSE have stated in their presentation to this committee, "The Ontario Securities Commission, as lead regulator, will maintain its current regulatory and oversight powers over the TSX and its issuers. Undertakings made to each of our Canadian regulators will be maintained, with new undertakings committed to under the provisions of our merger proposal."

As part of our review of the proposed transaction, we will examine the structure, operations and undertakings of the merged group to ensure that they meet the established criteria for recognition and are in the public interest.

In addition, we will determine the terms and conditions that may be required to enable us to continue to maintain our regulatory oversight of the exchange going forward. This is critical to ensure the quality and integrity of the operations of the exchange and the broader market that it serves.

The terms and conditions will, at the end of the day, ensure that:

- investors are afforded protection;
- issuer access to capital will remain and issuers continue to be appropriately regulated;
- the regulation of trading on the exchange remains robust; and
- the governance of the exchange remains appropriate and effective.

I would like to emphasize that the OSC's role is not to approve or reject the proposed transaction. However, certain securities regulatory approvals are required in order to complete the proposed transaction. We expect to receive an application, which we do not have yet, from the TMX shortly, requesting that the OSC approve changes required to the recognition order of the TMX Group and TSX Inc. and approve the LSE Group beneficially owning and exercising control and direction over more than 10% of the TMX Group.

I note that this share ownership restriction has been in place since 1999, and this represents the first time that an application is being made to approve beneficial share ownership of more than 10% of the TMX Group.

Once we receive the application, and prior to making any decision, the OSC, as a commission, will publish the application along with a notice inviting public comment.

Our review will include a transparent process that will solicit public input from interested parties before any policy decision is made. As part of the public comment process, we will hold a public hearing to provide an opportunity for input, both in writing and orally, and to provide the commission with the opportunity to ask directly questions and elicit information from interested parties.

Also, we will have discussions with the Financial Services Authority in the UK—they regulate the London Stock Exchange, as you know—about regulatory co-operation and oversight.

Members of the committee, I would like to conclude by emphasizing that the OSC's focus is on the regulatory aspects of the proposed transaction. Our role is to conduct a full regulatory review in the public interest. While it appears that this is uncharted territory, we do have an established framework that will allow us to examine the regulatory aspects of the proposed transaction with a view to assessing whether it is in the public interest to provide the required approvals.

While exchanges operate in a global arena, and consolidation is ongoing, it remains the responsibility of the local regulators to ensure regulatory oversight continues to be strong and effective. To this end, we will examine all information available to us and impose terms and conditions necessary to ensure that we continue to have oversight over the strategic and policy direction affecting the TSX going forward. This is essential in order to fulfil our regulatory responsibilities to provide protection to investors, to facilitate fair and efficient capital markets and to foster confidence in those markets.

Mr. Chairman, thank you. I would be pleased to answer questions.

**The Chair (Hon. Gerry Phillips):** Colleagues, I have a suggestion: I think we could do two rounds of seven minutes each, just so you each get a chance, beginning with you, Mr. Shurman.

**Mr. Peter Shurman:** Very well. Thank you, Mr. Wetston.

It's interesting, hearing the specifics of how your oversight works. Because of how you've described the oversight, I'd be interested to know: Does the TMX-LSE need to have fair and meaningful representation by independent directors to the extent that you could impose changes to the agreement they've made to maintain what you consider to be fair and meaningful representation versus what they see as fair and meaningful representation?

**Mr. Howard Wetston:** That's a very interesting way of putting the question, I have to say. Basically, when parties, as business organizations, come together and develop a transaction amongst one another and decide on how that's going to go forward, either from a share ownership or a governance perspective, then it appears before the regulator. The regulator then has to examine whether that structure is one that is compliant with their view of what the public interest is. I would have to say that I think that's an issue that clearly will have to be



considered in the context of the matter before the commission.

As you might imagine, Mr. Shurman, we don't have an application. We cannot pre-judge the application for obvious reasons; I think you would understand that completely—

**Mr. Peter Shurman:** Actually, I want to make it clear for you and for the committee. I'm not asking you to; I'm trying to get the—

**Mr. Howard Wetston:** I know you're not. Really, what I'm saying—and forgive me for suggesting that, because I wasn't, really. What I was really getting at is, I think that's the kind of issue that we need to consider in the context of the application, the kinds of issues that we obviously need to sort out with the parties as to whether or not, indeed, the terms and conditions of the approval of the recognition order will require that type of treatment.

**Mr. Peter Shurman:** You touched on it, but I'd like you to elaborate on the ability that you have to impose criteria or conditions on a parent company. In this case, we'll call the parent company holdco, because they're looking at a company to be formed from the two entities. It sounds to me like you do; how broad can that be?

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**Mr. Howard Wetston:** That's another really good question, I have to say, because I think that's an important one for the commission. I think that's another area that we need to pursue with the TMX Group, with the holdco, with the LSE. This is a matter which will clearly come up in the context of the proceeding, and let me suggest why. Right now, we do regulate the TMX Group, so you're absolutely correct. They're a holdco and they're the listed company.

From the perspective of the new arrangement, what we see, in the materials that have been provided—and I make no comment on the merit of it or whether or not I agree or disagree—what I would say is that they have brought them forward in terms of undertakings from the holdco to the securities commission. I think we need to examine that question very carefully. In other words, the question of the undertakings: Are they appropriate? Are they sufficient?

In that context, we would then have to decide whether our authority would allow us to say that we either want more undertakings or we want something different in order to be able to approve the request for the recognition of this exchange.

**Mr. Peter Shurman:** There has been quite a bit of conversation, mostly in the media, about what the levers are and who holds them on this transaction. You've been very careful, and so have I, and I think my colleagues will be as well, not to be in prejudgment mode, but we want to understand and make sure the public understands whether you hold the lever and what it is.

It sounds to me, from the description in your presentation, that you have absolute ability to make this go or no-go, and just to take at arm's length, any transaction like this, go or no-go. Is that your understanding of your mandate?

**Mr. Howard Wetston:** It would sound a bit too omnipotent, from my perspective.

**Mr. Peter Shurman:** Forgive me for that.

**Mr. Howard Wetston:** But I understand the thrust of your question.

I think I could say that clearly the parties need to satisfy our view of what the public interest will require in the context of the criteria that we believe are necessary to satisfy that interest. I've tried to lay out in my remarks on what those criteria are, more or less, and the kind of information which we will need, and we don't have yet, to ascertain whether or not those criteria have been satisfied.

The one thing that I would say about that is, there's also the 10% issue. They will be applying, I think, for both: the recognition order as well as the relief on the 10%. If the commission determines that any of the criteria are not met, the recognition order will not be approved. I'm quite clear.

I think if you look at it from that perspective, you might then say, "Yes, that could be an impediment to the transaction proceeding." What we need is the information, we need the evidence, we need the facts, and we need to assess it to determine whether they're met or not.

**Mr. Peter Shurman:** You have made it clear, and you're making it clear again, I believe, and let's just make sure that this is on the record, that the approvals that you, in effect, have to consider are: Should we change our own regulatory situation to go above the 10%? Because that applies to everybody, as of now, so, is that in the public interest? And the secondary, and equally important, if not more important, one is: this transaction on its merits. Is that true?

**Mr. Howard Wetston:** Yes. Rather than thinking about the transaction on its merits, the way that I would look at it is whether or not the parties are able to fulfill our requirements that the terms and conditions and the criteria meet the public interest. If they do, then I think it would be incumbent on the commission to allow the recognition order to proceed.

In the event that they're not met, then I believe that it's incumbent on the commission to exercise its discretion and not permit it to proceed on that basis. Basically, you cannot carry on the business of an exchange in Ontario unless you are recognized to do so by the commission.

**Mr. Peter Shurman:** Let's just take it a step away from the transaction itself. We've heard deputations for three days—three days of hearings from people who are violently in favour and violently opposed, some who fall somewhere in the middle or people who say that if certain conditions were achieved then it would be okay and otherwise not.

Let me ask you from your expert position whether you acknowledge what many have said on both sides of the this question, which is: If this isn't approved for whatever reason by all the approval authorities, which go from you right up to the Ministry of Industry of Canada under the Investment Canada Act, that you're still going



to, down the road, probably not in the too-distant future, have to look at some other form of same.

In other words, if it's not London, it will be somebody else, or maybe it will be in the opposite direction, and the TMX Group will go and take over something else or merge with something else. But this is a world, we're told, of consolidation in the exchange area, and without it the TMX will float free and not be as successful as it has been in the last, say, period since the mutualization. Is that a reasonable perspective, from your view?

**Mr. Howard Wetston:** I guess I would like to put it this way, if I could: I would think that the commission might have a view on that if I felt it was relevant to our consideration. I'm not sure whether that's entirely relevant to—

**Mr. Peter Shurman:** It probably isn't, Mr. Wetston, but you're an expert and I'm not.

**Mr. Howard Wetston:** You're rapidly becoming one, sir, after all the testimony I've seen before the committee.

But I think the best way, frankly, for me to answer that question might be to say that I think you cannot deny that there's a lot of consolidation occurring internationally. A lot has occurred already with NYSE Euronext. We have seen publicly the notion that there is a further transaction between NYSE and I think the Deutsche Börse. We recognize it's still ongoing. The Singapore and Australian exchanges are still in negotiation; regulators are looking at that. We're very familiar with NASDAQ OM. We understand the consolidation that's occurred in Europe.

It would be challenging to deny the fact that there's considerable consolidation of exchanges going on globally, just as it would be very difficult to deny the fact that there's an extremely significant amount of exchange-related competition, particularly in North America with ATSS and ECNs, electronic networks. There is a fair amount, also, in Europe. I think it would be the case that market structure and markets are changing considerably as a result of these kinds of events.

**The Chair (Hon. Gerry Phillips):** We're going to move on to Mr. Bisson.

**Mr. Gilles Bisson:** Well, thank you. I wish we had a whole bunch of rounds of seven minutes because, where to start? My, my.

Let's first of all just pick up on the 10% rule, because under the act—originally the act read that no one entity of the holding company could be more than 5%, and eventually that was changed to 10%.

**Mr. Howard Wetston:** Yes.

**Mr. Gilles Bisson:** At this point, this holding company is going to own more than 10% of the TSX. How do you square that peg?

**Mr. Howard Wetston:** Well, can I confess something to you?

**Mr. Gilles Bisson:** Sure. Do you want to do it in secret?

**Mr. Howard Wetston:** Nothing we do at the OSC is secret; it's all transparent and public.

I was at the OSC in 2002-03 as a vice-chairman, and I actually signed that order, which increased it from 5% to 10%. So you're more or less asking a very good question to the—

**Mr. Gilles Bisson:** Maybe the right or the wrong guy.

**Mr. Howard Wetston:** You could ask my colleague.

I think we need to consider similar criteria. There are the criteria that we consider, which I've kind of outlined, that suggest that the recognition order may be in the public interest. You recognize, of course, that we limited it at 10% because we wanted to ensure that the TMX was widely held. That may still occur, by the way. I'm not suggesting it wouldn't be because of the 55% ownership, if it was to occur. It could still be widely held. But having said that, I think that the same criteria would need to be considered in that consideration.

**Mr. Gilles Bisson:** But clearly, what was set out by the Legislature in regard to the act and the 5% rule eventually meant that the 10% was—we didn't want one entity controlling the entire holdco of the stock exchange, because then they could do procedural things, as far as how they run as a company, that might not be to the public interest. Being that we're seeing this merger happen, if it does go forward, where we're going to be above 10%—whatever that number might be—I would argue then, and I take it what you're saying is yes to the question, that this is something that you will need to review because it will affect the public interest.

**Mr. Howard Wetston:** I don't think there's any question that that's the case. And it will be the commission, the entire commission, that will eventually consider that.

**Mr. Gilles Bisson:** Let me go back to the ATSSs. They provide a competition to the Toronto Stock Exchange. Is that competition something that is desirable?

**Mr. Howard Wetston:** I think there's always a debate about competition—

**Mr. Gilles Bisson:** Competition is good as long as you don't compete with me, right?

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**Mr. Howard Wetston:** That's exactly the debate that most people who don't like competition suggest; I agree.

**Mr. Gilles Bisson:** But for the investor—

**Mr. Howard Wetston:** My role in life is to be a monopolist. It's just the nicest place to be.

**Mr. Gilles Bisson:** So it was for Genghis Khan. Look what happened to him.

My question is, from the investor's perspective, we have, as you listed in your presentation, six alternative platforms that people can go to other than the two main ones, the CNSX and the TSX. Is that desirable from the investor's perspective?

**Mr. Howard Wetston:** I think there has been a lot of discussion about that, a lot of debate and a lot of analysis. The bottom line, I think, is that investors have benefited considerably from ATS competition.

**Mr. Gilles Bisson:** So is there not a danger in having yet larger and larger exchanges around the world, which, as they merge together, eventually what happens to the consumer, the investor, is it becomes that you're trying to



do business in not a competitive environment but, more or less, a monopoly-type environment?

**Mr. Howard Wetston:** I don't think there's anything that I could say that would suggest to me that—we always need to be concerned about enhanced market power and increased concentration that might invariably affect the markets in a way that you described.

My hope would be that, in the event that you get increased concentration, or larger firms and they combine, alternative systems are able to compete and allow for the opportunity to ensure that you still have competition. I'm speculating—

**Mr. Gilles Bisson:** And that, as you can understand, is hard to do. Just use the Walmart example. Go to small-town Ontario, wherever that might be; it's hard to compete against the Walmarts of this world because of their very size and being able to, quite effectively, control the supply and the sale of products.

I guess my question to you—I've only got a few minutes. My point was that—I'm just paraphrasing what you said—in the end, from the investor's perspective, the competition of having various platforms is good. There is a danger that by amalgamating the TSX and the LSM, and further mergers later, the consumer will be left with less choice, and that, in the end, may not be desirable for the consumer.

**Mr. Howard Wetston:** I can't go quite that far with you.

**Mr. Gilles Bisson:** I thought you did.

**Mr. Howard Wetston:** I think you're a very skilled examiner, but I can't go quite that far with you.

I think, really, my point was not quite that. My point was more general, in the sense that I agree with you that increased concentration could lead to increased market power, which could lead—could lead—to the possibility. But what I was suggesting was, basically, given the fact that ATSS are very significant technology players, I believe that sufficient competition might occur to be able to mute any market power that might adversely affect customers.

But I have to say this: I think you have to examine it in the actual context of the market, if that occurred.

**Mr. Gilles Bisson:** Okay.

Under section 21 of the act, you have the ability to review this from the perspective of the public interest, and it sets out fairly clearly under section 21 what your authorities are under that. One of the issues that I've been raising, and others have raised it as well is: We start this deal off where we're slightly in a minority on the holding company—seven of 15; we look at the act after four years, and it has changed based on whatever the new company looks like, and we can go down to as far as three out of 15. Is that a subject of interest to you? Let me just start like that.

**Mr. Howard Wetston:** I think the best way for me to say that is, it will be of interest to the commission.

**The Chair (Hon. Gerry Phillips):** We're going to have to move on, Mr. Bisson. We'll come back to you.

**Mr. Gilles Bisson:** That was just the primer question for the next turn.

**The Chair (Hon. Gerry Phillips):** Give him a chance to get ready for the supplementary, then.

Mr. Arthurs?

**Mr. Wayne Arthurs:** Mr. Wetston, thank you for being here this morning. I appreciate the presentation, and I think, like others, we're not the experts, but you can say that we're learning a lot around this table—at least I am.

**Mr. Howard Wetston:** I think that's the great value of this exercise.

**Mr. Wayne Arthurs:** It is, at least, in part, for us and for those who pick up on what's happening here. They get a chance to hear from yourself and others with various expertise and various opinions on this particular matter.

I want to pick up almost from where Mr. Bisson left off, I think. My sense would be that the OSC's role in this will not be one to evaluate whether or not this is a good business deal for the TMX or the LSE; your role, as I understand it from your comments, will be to establish whether or not, in part, this is in the public interest.

Is that a fair assumption, that you're really not looking at whether this is a good business deal? At the same time, if that's not the case, then what elements of it would you see as being part of the public interest matter?

**Mr. Howard Wetston:** I think, once again, that's an interesting way of putting the question. I kind of avoid social utility views of the transaction, from my perspective.

What I'm really suggesting is that, when we talk about the deal itself, the transaction itself, our authority allows us to do certain things and requires us to do certain things. I think I've tried to suggest that we have a framework in which to exercise our review, assisting us to determine whether or not we will recognize the business of an exchange in Ontario. I think I've tried to outline that, and I think you've just indicated that.

As far as the business deal is concerned, I think you can understand that we don't have that responsibility; others do. For example, I am unclear as to whether or not the parties had a competition review of the merger with the Competition Bureau in Ottawa, an organization I have a lot of familiarity with in my past experiences. They would have a merger review responsibility. Investment Canada, I think, would have a merger review responsibility. So they would look at the business of the deal more and the net benefit test.

I think from our perspective, if the business aspects of the deal—there may be aspects of it that are similar to the criteria that we would examine, from a public interest perspective. But I think it's very clear that we don't have a responsibility to determine whether this is a good deal or a bad deal. Certain aspects of it that I discussed would clearly allow us to come to a conclusion as to whether or not the transaction, from a regulatory perspective, would be in the public interest.

I recognize that's a bit of a vague answer, but I think what I'm trying to suggest is that we are not really look-



ing at the financial, business components of the transaction. What we want to make sure is that we have a viable asset doing business as an exchange in Ontario, today and into the future.

**Mr. Wayne Arthurs:** So then, when you were looking some years ago at the changes from a 5% to a 10% ownership piece, presumably then as you look at this, in my context, looking at something between 45% and 55% changes the complexion a bit, whether the ownership rests in the majority with TMX or in the majority with something offshore, for all intents and purposes—

**Mr. Howard Wetston:** As I said before, the corporate governance issues are very relevant to our consideration of the terms and conditions associated with the operations of the exchange.

If I could just go back to the question Mr. Shurman was suggesting—t's around this issue. As well, Mr. Bisson, I think, mentioned it with the eight and seven. When we regulated the TMX Group initially, corporate governance was an extremely important component of that as well. Although at that time we, I think, allowed that 50% had to be independent directors, and I think the entire board is independent. Would that be fair?

*Interjection.*

**Mr. Howard Wetston:** And that's a consideration that obviously, we dealt with at the securities commission.

**Mr. Wayne Arthurs:** Among the discussion that's happened here, there's been concern expressed by various people that we might cede authority for regulatory control to the LSE. Within your submission, you commented that as part of the review, you would be consulting with the—

**Mr. Howard Wetston:** The Financial Services Authority of the UK, yes.

**Mr. Wayne Arthurs:** Can you speak to that at all in the context of the nature of those discussions, not specifically, but what's the objective in doing that, and how does that speak to the role of the OSC in ensuring that we maintain strong regulatory control?

**Mr. Howard Wetston:** I think if you look at the transaction itself, there still seems to be—and we will assess that in the context of our proceeding. We will get more facts. We will get more information. Trust me: We will ask a lot of questions, and we will get a lot of information for us to assess objectively when we go through this process. But I think the FSA itself also, as a regulatory body—we're all members of the International Organization of Securities Commissions. We dialogue a lot together. We spend a lot of time on international committees together; our staff and we do, as organizations. There's a lot of understanding and agreement with respect to how we conduct our regulatory affairs.

The point is that the purpose of oversight and co-operation agreements—we don't have one with the FSA. I'm suggesting that we will have those discussions, and I know and I can say that the FSA is interested in discussing that matter with us as well as with BC, Alberta

and Quebec; I know that they are. We will begin those discussions as part of our review of the transaction.

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"Coordination and oversight" obviously means that they still will have their regulatory authority; we will have our regulatory authority. We have them now, by the way, with the SEC. We have strong arrangements with the SEC and we have them with other regulators as well. We're in the process of invariably discussing these kinds of arrangements with other regulators.

Having said that, it really boils down to a matter of information-sharing and understanding what each regulator is doing in certain circumstances to avoid each regulator taking steps that might, somehow or another, affect the regulatory ability of the other regulator doing its job in its jurisdiction. So I think it's very effective from that perspective.

**The Chair (Hon. Gerry Phillips):** Thank you. We'll move on now. Mr. Klees.

**Mr. Frank Klees:** I'd like to continue on this line of discussion regarding the FSA.

**Mr. Howard Wetston:** Sure.

**Mr. Frank Klees:** A broadly used term in the industry with reference to the London Stock Exchange and the regulatory oversight is "light touch." You're familiar with that term?

**Mr. Howard Wetston:** In other contexts.

**Mr. Frank Klees:** I think it probably has the same implication.

**Mr. Howard Wetston:** It might.

**Mr. Frank Klees:** The concern about that is that we take a great deal of pride here in this jurisdiction that there is strong oversight, that the listing process is strenuous, that the reporting requirements have a very high standard. My understanding is that when we compare the standards of our jurisdiction to those under the FSA, there's a marked difference. My question to you is, what is it that can be done to ensure that there isn't going to be a watering down of those standards that would compromise not only the issuers, but the investors, and would essentially compromise the reputation that we currently have internationally?

**Mr. Howard Wetston:** I have to be careful about my response, not because I have any hesitation in saying this, but I really don't have any information or evidence to suggest that in any way the FSA does not regulate the London Stock Exchange in a robust, effective manner. I have no basis, no evidence to suggest that.

**Mr. Frank Klees:** Could I suggest that perhaps it would be helpful for you, in preparation for your own hearings, to seek out the comparisons in terms of the reporting requirements that issuers have under the FSA as compared to our very rigid standards?

**Mr. Howard Wetston:** I'd be happy to review it.

**Mr. Frank Klees:** It's something that I know investors are concerned about. Investors who invest here know that they have a very rigid framework. They can rely on the kind of reporting that issuers are required to do on a very regular basis as opposed to almost a



narrative-type of reporting that I understand is acceptable under the FSA—

**Mr. Howard Wetston:** Mr. Klees, we're happy to take a look at that issue, of course. My comment about the FSA and the LSE is that we in Canada, in Ontario, will continue to regulate our exchange, and the FSA will not be regulating our exchange.

**Mr. Frank Klees:** Another question with regard to FSA: I was advised just yesterday that the FSA will be dismantled.

**Mr. Howard Wetston:** Yes.

**Mr. Frank Klees:** Could you comment on that? What is expected to replace it, and in what time frame?

**Mr. Howard Wetston:** You know, I do have some information about it, but if I were asked to outline three pieces, I think I might not be able to do that.

It flows out of the financial crisis, of course. As you know very well, the financial crisis was felt greater in Europe than in Canada, as well as in the United States. The British government decided to reorganize the FSA.

The FSA is a different body than us because they do prudential as well as securities regulation; we only do securities regulation. As you know, in Canada, our prudential regulation is shared between OSFI and, of course, the Bank of Canada for our banks.

I think what they're doing is splitting up the FSA to have a securities regulator and a prudential regulator. I think there's another regulator in that that has a strong consumer orientation. I believe the former chairman of the Hong Kong exchange is taking over that role in the UK.

I'm not sure if my staff has any better information. We can provide it to you. I'm happy to provide to you the specifics of it. I can't remember the names or the entities, but that's the source of what had occurred.

**Mr. Frank Klees:** So essentially, whoever is doing the review of this proposal in the UK may not be there. Does anybody know what the time frame is? I was told it was a short time frame.

**Mr. Howard Wetston:** No, because I asked that question recently of somebody, and they're unclear when it's going to occur. I think what we can do is try and get you more information, and we'll provide that information to you as best as we can provide it—

**The Chair (Hon. Gerry Phillips):** About a minute left.

**Mr. Frank Klees:** I also understand that the proposed holdco will actually be registered in the UK. There are some implications to that in terms of oversight. Can you tell me what your view is, in terms of the implication of that registration? Are you comfortable with that? Do you have any concern that your reach may be somewhat limited by that very structure?

**Mr. Howard Wetston:** I think, once again, that that's a really good question, and it's one that we really need to drill down on when we have our proceeding. We need to get more information about that, the implications of that.

As I think I mentioned before, the agreement has a lot of undertakings in it from the future holdco to the

regulators with respect to how they intend to function. Changes and other such things will require approval. We need to look at the nature of those to determine whether those undertakings are sufficient. We need to determine whether or not it meets our criteria, "in the public interest." Those kinds of questions, I can assure you, will be examined in the context of the proceeding. As you might imagine, when we get to that, we will get a lot of information. That will be of no surprise to the parties, I'm sure.

**The Chair (Hon. Gerry Phillips):** Thank you. Mr. Bisson.

**Mr. Gilles Bisson:** Just a quick question in regard to the regulatory robustness of the FSA as compared to the OSC. What happened with AIM, obviously, was a lesser standard when it came to the listing of mining stocks. To say that it's just as robust is a bit of a stretch when it comes to the mining industry, would you not say?

**Mr. Howard Wetston:** I can't say. I really cannot say. I would really like to assist you with that. I read as well, but I don't formulate views unless I have the facts before me, and I don't have a view on that.

**Mr. Gilles Bisson:** Okay, I won't comment on that.

Okay, that question's done. The other thing is, you have authority in regard to the actual running of the holding company. The OSC has authority in order to—

**Mr. Howard Wetston:** For the TMX Group, yes.

**Mr. Gilles Bisson:** That's right. Once this particular company is then taken over—let's say it's allowed—would you still have authority in order to have a say about what's happening with that holding company?

**Mr. Howard Wetston:** That's one of the issues we need to address in our proceeding.

**Mr. Gilles Bisson:** But you're not clear at this point? It would fall under the FSA, is my understanding.

**Mr. Howard Wetston:** Yeah. I think the listed company will be the new holdco. I think that holdco will be listed there and here.

**Mr. Gilles Bisson:** But does that give you—because it's been said that FSA will regulate the holdco, but my sense is that you should have some kind of say.

**Mr. Howard Wetston:** The way in which it's structured now is, the holdco is making a group of undertakings. There's a whole host of undertakings going to things like operations; continuity; no changes without approval of the OSC. That's how they are attempting to ensure that the OSC is able to be informed and has approval over changes that might affect our exchange.

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**Mr. Gilles Bisson:** Just technically speaking, if that would not be in the agreement, FSA would have the regulatory authority over the holdco. It's because of what's in the agreement that gives you—

**Mr. Howard Wetston:** I would think, if I might say, that you're right. I can say, without question, that the FSA would have authority for sure. The question would be: What is the extent of our authority? That's what you're asking.



**Mr. Gilles Bisson:** And that's really where it is a bit grey or, I would say, quite grey. For example, decisions that the holdco will make four years from now, when the new agreement—if this thing is agreed to in four years, then they have an ability to restructure under the agreement. We could find ourselves in a position where we're on the losing side of a decision, with no ability to really have a say about what the holdco is doing. We could find ourselves in that position, right?

**Mr. Howard Wetston:** We would need to assess that in the context of the material that we have.

**Mr. Gilles Bisson:** You're very good.

The other issue is that, as far as the approval—just for the record, I believe, in the end, that's where the weakness in this agreement is. That's just my personal editorialized view.

**Mr. Howard Wetston:** Mr. Bisson, you're certainly entitled to have that view. By the way, I'm looking at the same information as you. I don't have any more information.

**Mr. Gilles Bisson:** No, no. I realize we just have the agreement and everything else.

The other thing: The approval of this will be not just Ontario, but it'll be the various regulators in Montreal, Calgary, Vancouver. They all have to agree and they're all subject to the 10% rule, right?

**Mr. Howard Wetston:** No, only Quebec.

**Mr. Gilles Bisson:** Only Quebec?

**Mr. Howard Wetston:** Only Quebec and Ontario. Quebec is involved in the approval of the 10% because of an undertaking—

**Mr. Gilles Bisson:** Could it be possible to think that Quebec may have a much more nationalistic view of this particular merger or takeover?

**Mr. Howard Wetston:** You know very well, Mr. Bisson, that I'm not going to comment on that.

**Mr. Gilles Bisson:** Exactly. So you could end up in a situation where Ontario says yes and Montreal, because of its nationalistic view—I'll be polite—says no, and the whole thing is scuttled.

**Mr. Howard Wetston:** Let me put it another way: With different regulators, you always have the potential of different opinions, obviously.

**Mr. Gilles Bisson:** Ultimately, at the end, if, let's say, you decide, "Yes, I'm going to approve this"—and I don't think you will in the end, but that's just my guess. If you did approve this, it is subject to an appeal within 30 days to the court. But ultimately it's a legislative—

**Mr. Howard Wetston:** I'm just getting my figure confirmed. It's a 30-day period. That's right.

**Mr. Gilles Bisson:** Yes, it's a 30-day period, and the minister has the ability to make a submission to the court, I guess, like anybody else, but ultimately it's up to the Legislature, is it not? Because we control the act, and if we decide we don't like this, as a Legislature, we can very well just change the act.

**Mr. Howard Wetston:** Well, I can't disagree with you there.

**Mr. Gilles Bisson:** Those are all my questions.

**The Chair (Hon. Gerry Phillips):** Okay, thank you, Mr. Bisson.

**Mr. Howard Wetston:** In the sense that the Legislature can change the legislation, of course.

**Mr. Gilles Bisson:** That's right. So ultimately Ontario can approve or disapprove this if we chose to, because we control the act.

**The Chair (Hon. Gerry Phillips):** Mr. Arthurs.

**Mr. Wayne Arthurs:** Just a couple of minutes; I know Mr. Zimmer has—

*Interjection.*

**Mr. Howard Wetston:** Just let me clarify. Of course, ultimately, the Legislature can invariably pass legislation and amend legislation. That's the democratic role and the rule of law in our constitutional democracy, of course.

**Mr. Gilles Bisson:** Vive la démocratie.

**Mr. Howard Wetston:** Absolutely. So we've done social utility and democracy, Mr. Bisson.

**Mr. Wayne Arthurs:** Let me come back, very briefly, to where I left off. I think Mr. Klees picked it up, just to reinforce it. It wouldn't be in the public interest—my words—for the OSC to see a watering down or, since it's early in the morning, a decaffeination of its regulatory capacities with the TSX.

**Mr. Howard Wetston:** I would go further. I would say there'd be no question that we would resist any watering down or diminution of our regulatory oversight or responsibility.

We, through our examination of the transaction, would resist any diminution of the capacity of our exchange to function in the way that we expect our exchanges to function in this country because of the viable role that they have. So I would go farther and say: of course.

**Mr. Wayne Arthurs:** Okay. Mr. Bisson was just speaking to the other regulators: Quebec, national interests, and the like. Is there any particularly different role that the OSC has, as you've stated, as the lead regulator on the TSX? It also regulates the TMX Group. I noticed in your comments that the OSC is the only one of those that regulates the TMX Group. Since this is a TMX-LSE potential merger, does that in any way change the role or capacities of those other—the other problem is the other exchanges.

**Mr. Howard Wetston:** It goes to the similar issue that I was pursuing with Mr. Klees around how this transaction appears to be structured around a holdco, which will then operate the exchanges in Italy and in London and in Canada, and that what we presently have are terms and conditions from both the TSX Inc. and the TMX Group.

As I indicated before, it appears from the agreement that the holdco is going to make a number of undertakings to the OSC in the context of its application with respect to issues associated with the ongoing operations of the exchange. Of course, a number of them are listed.

The question, then, that we would have is—those are in the form of undertakings. I think, basically, questions will come forward with respect to whether or not we need to examine the transaction in any other way.

Presently, we have the TMX Group with terms and conditions; going forward, it looks like a somewhat different structure. We need to get quite granular—if I could put it that way—about those issues to determine whether that is appropriate to the criteria and the public interest that we need to ensure we represent.

**Mr. Wayne Arthurs:** Great; thank you.

**The Chair (Hon. Gerry Phillips):** Mr. Zimmer?

**Mr. David Zimmer:** Here's the thing that I'm really grappling with. Over the last few days we've had reasonable persons make the argument for why this is in the public interest or why it's not in the public interest. It reminds me of the old legal conundrum and the reasonable-man test—reasonable men can differ on what's reasonable.

**Mr. Howard Wetston:** We both know it well.

**Mr. David Zimmer:** We both know that test well. So can you tell me in point-form detail what you think the elements are that constitute the public interest? What are the core elements that have to be protected for you to say, "This is in the public interest," or "It's not in the public interest"?

**Mr. Howard Wetston:** They are the sum total of the criteria that I have outlined; that we will assess, get information, get the facts and determine whether or not we view the recognition of this entity as being in the public interest.

**Mr. David Zimmer:** I appreciate that, but the rubber hits the road somewhere. We've heard some people say—they look at the big economic picture—that economically, this is a good thing for the province and the country; others say it's not because there are risks that stuff is going to move offshore, and so on and so on.

I know you're going to take all of these factors, but what are some of the core elements of the public interest?

**Mr. Howard Wetston:** I think you know from your legal background and your legal work that ultimately, the public interest is a matter of the discretion of the decision-maker, taking into account the appropriate considerations as to what it believes according to whether the mandate and objectives of its statute are met.

You know very well, from your own legal background, that we would look at the objectives of our legislation as combined with the expertise that we have as a commission and the work that we do in examining the appropriate considerations—I underline "the appropriate considerations"—that lead to the decision that we have to make, and come to a conclusion as to whether that's in the public interest.

**The Chair (Hon. Gerry Phillips):** About one minute, Mr. Zimmer.

**Mr. David Zimmer:** At the end of the day, I have to say that reasonable men and women can reasonably differ on what is in the public interest. At the end of the day, though, it's your commission that has the final say or the hammer on what the public interest is.

**Mr. Howard Wetston:** Yes, I think that's correct. I think we are the only body that has that responsibility. In

the context of the transaction, of course you could say that the net benefit test that Investment Canada is responsible for would also be considered in the context of the public interest. But it's governments and agencies and tribunals that have that responsibility. As difficult as it is to define, I think it's a matter of weighing the appropriate, relevant considerations and exercising your best judgment in that context, on behalf of the public that you are responsible for ensuring it has the services of this organization.

In the context of the matters which I indicated—the protection of investors, fair and efficient markets—that's what we need to end up with as we do this kind of analysis.

What I am kind of surprised about, Mr. Zimmer, and I think, given your legal background, you would understand this: A number of people seem to be very certain about matters which, from my perspective, are very uncertain.

**Mr. Peter Shurman:** Howard, do you want to run for the Libs or the PCs?

**Mr. Gilles Bisson:** No, I think he's a social democrat.

**The Chair (Hon. Gerry Phillips):** Mr. Wetston, on behalf of the committee, thank you very much. You've been very informative for us.

**Mr. Gilles Bisson:** On a point of order, Mr. Chair: After they're done, I've got a matter that I want to—just after we've excused him.

**The Chair (Hon. Gerry Phillips):** Thank you very much, Mr. Wetston.

**Mr. Howard Wetston:** Thank you very much, and I appreciated all of your questions.

**The Chair (Hon. Gerry Phillips):** Do you want something before we—there will be a subcommittee meeting right now.

*Interjection.*

**The Chair (Hon. Gerry Phillips):** Sure. Go right ahead.

**Mr. Gilles Bisson:** I requested from legislative research a document on the authority to veto the TMX-LSE merger. I just wanted to make sure—

**Mr. David Zimmer:** Sorry, I didn't hear.

**Mr. Gilles Bisson:** I just said I had requested from legislative research some information in regard to the authority that we have over the OSC and the merger etc: What are his rules, what are his rights etc? I'd like to distribute that to the rest of the committee members, so that you can have the same information as me.

**Mr. David Zimmer:** Thank you.

**The Chair (Hon. Gerry Phillips):** I think that concludes our hearings now. The subcommittee will meet to set timing on our report-writing. We can just meet now—

*Interjection.*

**The Chair (Hon. Gerry Phillips):** You're welcome to stay if you want, but the subcommittee needs to stay.

*The committee adjourned at 1000.*











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